

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
NO. 97-O-02**

DATE ISSUED: December 22, 1997

ISSUED TO: Bismarck Public School Board President Melvin Fischer
and District Superintendent Lowell Jensen

CITIZEN'S REQUEST FOR OPINION

On October 24, 1997, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Sophia Preszler regarding whether she was improperly denied access to a meeting of the Bismarck School District's Superintendent's Cabinet on October 23, 1997.

FACTS PRESENTED

A Bismarck School Board policy provides: "The Superintendent shall provide leadership in implementing an educational program within available funding and School Board policies." Bismarck School Board Policy: Superintendent's Job Description, CE, issued 11-10-97. This same School Board policy lists the performance responsibilities of the superintendent. These responsibilities include the following:

The Superintendent shall participate in all School Board meetings by assisting the board president in the development of the meeting agenda, by preparing background materials and analyses of issues brought to the board, and by preparing recommendations on all issues brought to the board for decisions.

The Superintendent shall assist the School Board with the development of school Board policy and shall establish rules, forms, guidelines, and procedures to implement board policy.

(Emphasis added.) A different Bismarck School Board policy provides:

The school board encourages the superintendent and administrative staff to create and maintain appropriate mechanisms such as councils, cabinets and committees to

1. foster good communications within the staff;

2. allow each member of the staff to have a voice in the development of policies and in the making of decisions affecting them.

Bismarck School Board Policy: Councils, Cabinets and Committees, CL, issued 2-11-80.

The Superintendent has established rules to implement School Board policy. One of these administrative rules provides:

Councils, Cabinets and Committees

The superintendent of schools may establish an administrative cabinet as an advisory and deliberative body consisting of those members of the school staff who hold major administrative positions. Its precise membership is to be determined by the superintendent who serves as chairman of the cabinet.

As a group, the cabinet will discuss and attempt to develop effective modes of operation for implementing policies. Functioning in an advisory capacity, individual members or groups as a whole may make suggestions and recommendations with respect to policy which in turn will be transmitted through the superintendent to the school board for consideration. As a cabinet it possesses no inherent authority, nor does it exercise any executive function.

The administrative cabinet is concerned with matters relating to:

1. Curriculum
2. Instruction
3. Pupils
4. Teaching and custodial personnel
5. Building administration
6. Budget development
7. Internal business operation
8. Maintenance and custodial standards
9. Community relations

The cabinet functions as a channel of communication. Its individual members bear the responsibility of disseminating information to staff members under their

charge, in promoting understanding of the total school program and assuring its harmonious operation. It is the responsibility of the superintendent to keep the cabinet informed of decisions and activities of the school board pertaining to its concerns. Conversely, the cabinet has the responsibility of informing the superintendent and through him, the school board, of suggestions and problems originating with the school staff.

Bismarck Public School District Administrative Rule: Councils, Cabinets and Committees, CL-R, issued 2-13-78.

It is the position of the Bismarck School District that the meetings of the Superintendent's Cabinet are not subject to N.D.C.C. § 44-04-19, the open meetings law, because no authority is delegated to it by the Bismarck School Board and the Superintendent's Cabinet is not a "governing body" as defined in N.D.C.C. § 44-04-17.1(6).

ISSUE

Whether the Superintendent's Cabinet is a "governing body" of a public entity.

ANALYSIS

"Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public." N.D.C.C. § 44-04-19 (emphasis added). "Meeting" means a gathering of "[a] quorum of the members of the governing body of a public entity regarding public business." N.D.C.C. § 44-04-17.1(8)(a)(1) (emphasis added).

If the Superintendent's Cabinet is a "governing body" of a public entity, it is subject to the open meetings law.

"Governing body" means the multimember body responsible for making a collective decision on behalf of a public entity. "Governing body" also includes any groups of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.

N.D.C.C. § 44-04-17.1(6).

Thus, the Superintendent's Cabinet is a "governing body" if it is a "multimember body responsible for making a collective decision on behalf of a public entity." The phrase "public entity" includes entities created or recognized by "state statute, . . . resolution, ordinance, rule, bylaw, or executive order of the chief executive authority¹ of a political subdivision of the state to exercise public authority or perform a governmental function." N.D.C.C. § 44-04-17.1(12)(b). Even though designated as an Administrative Rule, the "rule" under which the Superintendent's Cabinet was created was established by the Superintendent, and not promulgated by the School Board. The other terms in the statute (resolution, ordinance, and bylaw) all reflect formal enactments by the authority responsible for making binding legislative or policy decisions on behalf of a political subdivision. The entity must be created or recognized to exercise public authority or perform a governmental function, which also indicates that a substantive policy decision is required. For these reasons, it is my opinion that "rule" as used in N.D.C.C. § 44-04-17.1(12) refers to enactments by the governing body of the political subdivision--in this case, the School Board. The Superintendent's authority is to implement, rather than establish, policies on behalf of the school district. Therefore, although created by a Superintendent's "rule," the Superintendent's Cabinet is not itself a public entity.

Thus, the "public entity" involved in this matter is the school district, and the multimember body responsible for making a collective decision on behalf of the school district is the school board, not the Superintendent's Cabinet.

The Superintendent's Cabinet may also be subject to the open meetings law if it is "acting collectively pursuant to authority delegated to that group by the governing body" of a public entity. N.D.C.C. § 44-04-17.1(6). The Bismarck School Board is the governing body of the Bismarck School District, which is a "public entity" under N.D.C.C. § 44-04-17.1(12)(b). The issue is whether the Bismarck School Board has delegated any authority to the Superintendent's Cabinet. As indicated under the FACTS PRESENTED portion of this opinion, the School Board policy simply states:

¹ The chief executive authority of a school district is the school district board. See Seher v. Woodlawn School Dist., 59 N.W.2d 805 (N.D. 1953) (school board's dismissal of teacher was exercise of an executive function).

The school board encourages the superintendent and administrative staff to create and maintain appropriate mechanisms such as councils, cabinets and committees to

1. foster good communications within the staff;
2. allow each member of the staff to have a voice in the development of policies and in the making of decisions affecting them.

Bismarck School Board Policy: Councils, Cabinets and Committees, CL, issued 2-11-80. This school board policy does not delegate any authority of the Bismarck School Board to any entity. It is under the Superintendent's rule that the Superintendent's Cabinet was created and duties specified. Thus, it is my opinion that the Bismarck School Board has not delegated any authority to the Superintendent's Cabinet.

CONCLUSION

Based on the above analysis, it is my opinion that the Superintendent's Cabinet is not subject to the open meetings law because it is not a "governing body."

It is my further opinion that there was no violation of the open meetings law as a result of the denial of access to the October 23, 1997, meeting of the Superintendent's Cabinet.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted By: James C. Fleming
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